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Informational Advantages in an International World—Kurtzman & Yago's *Global Edge: Using the Opacity Index to Manage the Risks of Cross-Border Business*

ILMR Editors

Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement Act and State "Buy Local" Legislation

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I. INTRODUCTION

The growing public concern over environmental protection, health, and outsourcing, coupled with the benefits of promoting domestic industrial growth, has resulted in increased scrutiny of international trade agreements. Many states have enacted "buy local" legislation seeking to temper the free trade movement by requiring state governments to purchase goods and services domestically. Courts differ in their interpretations of the constitutionality of "buy local" laws. Recent cases indicate that the enactment of "buy local" legislation by individual states infringes upon either Congress' interstate commerce regulatory authority or the President's ability to effectively represent the nation in foreign trade affairs. Unilaterally enacting legislation that impairs international trade may unintentionally create a hostile trading environment and may trigger trade retaliation. In this respect, "buy local" state legislation may potentially create greater domestic harm than that which it seeks to avoid.

This article analyzes the tension between the World Trade Organization's (WTO) Government Procurement Agreement (GPA) and "buy local" state legislation, concluding that the United States Trade Representative (USTR) should work more closely with states to ensure that state sovereignty concerns are recognized while preserving the President's international bargaining power. In arriving at this conclusion, this article reviews U.S. cases, WTO challenges raised by member countries, and policy considerations for both "buy local" legislation and

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international trade agreements. Part I of this article presents an overview of the WTO's GPA and its relevant provisions.[2] Part II explores court decisions regarding laws discriminating between local and international providers, including "buy local" legislation and comments on state law challenges to "buy local" laws brought under both domestic and WTO proceedings. Part III considers the debate between advocates of federalism and those favoring a national consensus, recommending (1) state legislatures consult with the USTR before enacting "buy local" legislation, and (2) the USTR seek stronger state support before recognizing international trade agreements.

II. WTO GPA AND RELEVANT PROVISIONS

The GPA embodies principles supporting non-discriminatory and reciprocal trade provisions for international government procurement markets. However, some member nations, including the United States, are unable to take full advantage of the GPA provisions because of persistent domestic anti-competitive practices such as counter-trade agreements and "buy local" legislation. To counter this problem in the United States, the USTR is working closely with states, encouraging states that have not currently signed the GPA to align state procurement policy with the GPA established by the WTO. The WTO was created in 1995 when members of the original Government Agreement on Tariffs and Trade (GATT) sought the creation of a new forum for trade relations.[3] Along with multilateral agreements, certain plurilateral

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 4, Plurilateral Trade Agreements, Agreement on Government Procurement, http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (last visited Apr. 1, 2008) [hereinafter GPA].

3. Mitsuo Matsushita, *Major WTO Dispute Cases Concerning Government Procurement*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 299, 300 (2006).

agreements[4] were created. The GPA, a plurilateral agreement, entered into force on January 1, 1996.[5]

The GPA provides member countries with a reciprocal agreement wherein they agree to provide access to their procurement markets. Government procurement, also called public procurement, "is the purchase of goods and services by the public sector."[6] A government procurement market exists when a government seeks to purchase goods and services to meet its needs and those of its citizens. However, unlike a private citizen or organization bidding on goods and services, governments generally have fewer procurement options due to legislative and administrative restrictions.[7] While restrictions on government procurement may be beneficial because they prevent abuse of government funds and exploitation of the private sector, they can also "[limit] the opportunities for the public purchaser to react strategically when confronted with cooperation among potential contractors seeking to increase profits."[8] The GPA encompasses a broad spectrum of procurement issues including contract valuation, tendering procedures, qualification of suppliers, selection procedures, negotiations, and awarding of contracts. The GPA also implements reviewing mechanisms to ensure that GPA members are able to meet their obligations to their citizens.[9] For example, reviewing mechanisms may require parties to create domestic procedures through which private bidders can challenge the government's procurement decisions and obtain redress from

4. Multilateral agreements are binding agreements between two or more parties, whereas plurilateral agreements are not necessarily binding between parties, but provide for negotiating parties to opt-in or opt-out of certain provisions.

5. World Trade Organization, Government Procurement: The Plurilateral Agreement on Government Procurement (GPA), Parties and Observers to the GPA, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visited Apr. 1, 2008) [hereinafter Parties and Observers to the GPA].

6. Organization for Economic Co-operation and Development, *Public Procurement: The Role of Competition Authorities in Promoting Competition*, DAF/COMP(2007)34 (Jan. 8, 2008), *available at* http://www.oecd.org/dataoecd/25/48/39891049.pdf.

7. *Id.*

8. *Id.*

9. GPA, *supra* note 2.

violations of the agreement.[10] The GPA also expanded GATT provisions to include services as well as procuring entities at the sub-central and local government levels. Additionally, the GPA includes provisions for public and government-regulated private companies.[11] Non-discrimination principles, including national treatment and most favored nation status, are at the heart of the GPA and seek to create transparency of laws, regulations, procedures, and practices regarding government procurement.[12]

The Organization for Economic Co-Operation and Development (OECD) estimated that the government procurement market was at US $5.5 trillion, or 82.3% of the world merchandise and commercial services exports in 1998.[13] US $2.08 trillion, or 30.1% of the government procurement market accounts for the world value of government procurement open to international trade.[14] The immense size of the government procurement market is perhaps one of the reasons that it has been subject to protectionism in the international trade arena. The existence of protectionism in turn suggests the agreement was created to address this behavior by creating a mutuality of obligations between member states.

There are currently forty parties to the GPA, nineteen countries with observer status, and eight countries negotiating their accession.[15] The USTR exerts pressure on those states not currently party to the

10. *See* Matsushita, *supra* note 3.

11. *Id.* at 302–03.

12. GPA, *supra* note 2.

13. *See* Margaret Liang, *Government Procurement at GATT/WTO: 25 Years of Plurilateral Framework*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 277, 277–78 (2006).

14. *Id.* at 277; *see also* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE SIZE OF GOVERNMENT PROCUREMENT MARKETS 26 (2002), http://www.oecd.org/dataoecd/34/14/1845927.pdf.

15. Parties and Observers to the GPA, *supra* note 5. Parties to the GPA include: Canada, the European Communities, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic, Slovenia, and Bulgaria, Hong Kong, China, Ireland, Israel, Japan, Korea, Liechtenstein, Aruba, Norway, Singapore, Switzerland, and the United States. Observers negotiating accession as a Member to the WTO include: Albania, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, Chinese Taipei, and Georgia.

agreement to join.[16] By joining the agreement, the state has the ability to determine which agencies will be covered and to identify the goods or services they wish to exempt.[17] Participating GPA members have incorporated the GPA provisions into their domestic procurement legislation[18] and therefore enjoy the best value for public expenditures without the hindrance of discriminatory and anticompetitive legislation.[19] Anti-competitive measures include the use of offsets, technology licensing, measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, investment requirements, counter-trade or similar requirements for awarding government contracts, or those measures that violate the principle of non-discrimination enshrined in the GPA.[20]

Despite its adherence to anti-competitive measures, the WTO recognizes that not all measures which can inhibit international government procurement violate the non-discrimination principles articulated in the GPA. Consequently, the GPA includes certain exceptions designed to accommodate security, health, and environmental concerns of the parties as long as they are not disguised as barriers to trade.[21] For example, the U.S. Government created a legitimate exception for small businesses and a minority set-aside as part of its commitment to the agreement.[22]

16. States include: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

17. Office of the U.S. Trade Representative, *State Government Procurement and Trade Agreements: The Facts*, Apr. 1, 2004, http://www.ustr.gov/Document_Library/Fact_Sheets/2004/State_Government_Procurement_Trade_Agreements.html.

18. *See* Matsushita, *supra* note 3.

19. *Id.* at 305–06.

20. *Id.*

21. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Article XXIII, Exceptions to the agreement, Apr. 15, 1994, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm#articleXXIII.

22. GPA, Appendices and Annexes to the GPA, U.S. General Notes, Agreement on Government Procurement, WT/Let/330 (Mar. 1, 2000), *available at* http://www.wto.org/english/tratop_e/gproc_e/usagen.doc.

The GPA entered into force in the United States on January 1, 1996.[23] Policies and regulations involving purchases by all U.S. central government agencies are bound to follow those specified in the GPA. The President retains the authority to waive application of discriminatory government procurement laws for procurements subject to the GPA and can order federal agencies to comply with GPA obligations.[24] Therefore, the GPA supersedes "Buy American" federal legislation.[25] However, these regulations do not apply to state government procurement provided the procurement is not connected to federal funding. [26] Because state government procurement markets are separate from their federal counterparts, states are given the choice to implement the GPA through commitments from their governors to the USTR and subsequent state legislation aligning the state procurement policy with the GPA.[27]

III. VALIDITY OF "BUY LOCAL" STATE LEGISLATION CONTESTED

As states have enacted "buy local" legislation, or procurement legislation limiting the type of firms with which state agencies and officials may do business, foreign corporations importing goods into the U.S. have brought litigation challenging these laws. This litigation has lead to the important Commerce Clause, Foreign Affairs Presidential Powers Clause, and Supremacy Clause jurisprudence. The federal Buy

23. Committee on Government Procurement, *Notification of National Implementing Legislation—Communications from the United States*, WT/98-2803 (July 15, 1998), *available at* http://www.wto.org/english/tratop_e/gproc_e/notnat_e.htm (follow "United States" hyperlink under "Notifications by Country;" then follow "Catalogue Record" hyperlink for Document # 98-2803 under "Search Results").

24. Trade Agreement Act, 19 U.S.C. § 2511 (2000); Agreement on Government Procurement, 46 Fed. Reg. 1653 (Dec. 31, 1980) (to be codified at 7 C.F.R. pt. 311).

25. Federal Acquisition Regulations, 48 C.F.R. § 25.402(a) (2007); Buy American Act, 41 U.S.C. §§ 10a–10d (2000).

26. Committee on Government Procurement, *supra* note 23, at Checklist of Issues, General Elements I.2.

27. Memorandum from Tracy Taylor, Legal Counsel for the Office of Program Research on The Legislature, The Governor & Int'l Trade Agreements: An Analysis of Washington Law to the House Comm. on Trade & Econ. Dev. 6 (Dec. 2004) (on file with author), *available at* http://www.leg.wa.gov/documents/OPR/ 2005/JLOCTP.pdf.

American Act[28] has essentially been replaced by the GPA, with extraneous provisions conforming to the plurilateral agreement.[29] Considerable complexity exists at the state and local level, where "buy local" laws mandate that state governments or local entities purchase U.S. or local-made products.[30] Some courts have applied the Commerce Clause to invalidate state laws that interfere with interstate commerce or foreign trade. Other courts have applied the Presidential Foreign Affairs Power to invalidate such laws. Still others have ruled that under the Supremacy Clause, federal laws preempt state laws when the two conflict.

A. State Legislation and the Commerce Clause

"Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[31]

Several courts hold "buy local" legislation unconstitutional under the Commerce Clause, reasoning that the power to regulate foreign commerce belongs solely to the federal government. Thus, state laws usurp this power when they prevent state governments from purchasing foreign-made products.[32] Within this framework, other courts have distinguished between state governments acting as market participants rather than market regulators in determining whether a violation of the Commerce Clause has occurred.[33] If the state acts as a market participant, similar to a private enterprise, it may select any supplier it chooses.[34]

In cases where Congress has not acted, but states have created laws that could hinder international trade, the Supreme Court is the final arbiter of the competing demands of state and national interest under the

28. 41 U.S.C. §§ 10a–10d, *supra* note 25.
29. Matsushita, *supra* note 3, at 308–09.
30. *Id.*
31. U.S. CONST. art. I, § 8, cl. 3.
32. Matsushita, *supra* note 3, at 310.
33. *Id.*
34. *Id.*

Commerce Clause.[35] Under this authority, the Supreme Court has considered the enhanced risk of multiple taxation schemes and the impairment of federal uniformity in regulating foreign commerce by holding that the tax impermissibly violated the Commerce Clause.[36] For example, in *Japan Line, Ltd. v. County of Los Angeles*, the court applied the Commerce Clause to strike down state legislation.[37] This case considered whether a state could impose a nondiscriminatory *ad valorem*[38] property tax on foreign-owned cargo containers of international commerce.[39] The Japanese shipping companies contended they were already subject to property taxes in Japan and California and therefore, a tax on their ships would constitute double taxation.[40] California asserted that the state should be free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation.[41] The court struck down this argument, noting that it has long been an accepted constitutional doctrine that the Commerce Clause affords some protection from state legislation inimical to national commerce.[42] *Japan Line, Ltd.* and other cases indicate that where a state law has a direct effect on foreign commerce or international trade, that law may be inconsistent with Congress's commerce power and therefore unconstitutional under the Commerce Clause.[43] Thus, whether the state infringes upon Congress's commerce regulating power depends on the role the state plays in the market.

1. The market participant doctrine

In determining the constitutionality of such laws under the Commerce Clause rubric, courts have created a distinction between states

35. 441 U.S. 434, 454 (1979).

36. *Id.* at 450.

37. *Id.* at 454.

38. This is a Latin term for "according to the value" and refers to a tax of real estate or personal property that is proportional to the value of the property taxed.

39. *Japan*, 441 U.S. at 435–36.

40. *Id.* at 437.

41. *Id.* at 454.

42. *Id.* at 455.

43. *Id.* at 453–54.

that act as a market participant and those that act as a market regulator.[44] The market participant doctrine considers states purchasing entities akin to private enterprises, as opposed to governing bodies enacting laws, when procuring the products that they need.[45] Under the market participant doctrine, there is no infringement on the Commerce Clause even if state governments exclude foreign products from their public purchases so long as the government agency was not functioning in a regulatory manner.[46]

The first case to make this distinction was *Hughes v. Alexandria Scrap Corp.*[47] In this case, the Supreme Court considered the constitutionality of a Maryland law designed to rid the state of abandoned automobiles by providing a bounty to those who delivered vehicles to scrap processors.[48] The law imposed higher requirements for delivery to out-of-state processors, thus incentivizing people to employ the services of in-state processors rather than out-of-state processors.[49] The appellee contended that the law violated the Commerce Clause by interfering with the free flow of interstate commerce.[50] The Court found that Maryland had not sought to prohibit the flow of automobiles or regulate the conditions under which it may occur.[51] Rather, the state entered the market to bid up the price, making it more lucrative for unlicensed suppliers to dispose of their vehicles in Maryland rather than take them out of state.[52] The Court reasoned that the primary purpose of the legislation was to safeguard the environment by offering bounties to encourage removal of automobile hulks.[53] Furthermore, the Court held that in the absence of congressional action, there was no constitutional

44. Matsushita, *supra* note 3, at 310.
45. *Id.*
46. *Id.*
47. 426 U.S. 794 (1976).
48. *Id.* at 796.
49. *Id.* at 801.
50. *Id.* at 802.
51. *Id.* at 806.
52. *Id.*
53. *Id.* at 809.

prohibition on the state from participating in the market and exercising the right to favor its own citizens over others.[54]

In *Reeves, Inc. v. Stake*, the Supreme Court again considered the market participant doctrine.[55] The Court addressed the issue of whether the State of South Dakota violated the Commerce Clause by engaging in its own commercial enterprise and confining the sale of cement produced solely to its residents during a time of shortage.[56] The Court reasoned that the Constitution did not intend to limit the ability of states to operate in the free market themselves; rather, the Commerce Clause was intended to apply principally to regulatory and taxing actions taken by the state.[57] Importantly, the Court also noted that Commerce Clause scrutiny may well be more rigorous in cases where a restraint on foreign commerce is alleged.[58] The dissent in *Reeves* reasoned that when the State enters the private market and operates a commercial enterprise for the benefit of private citizens, it may not evade the constitutional policy against economic Balkanization based in the Commerce Clause.[59] Furthermore, the prohibition on sale to customers beyond its border constituted a direct barrier to trade, inimical to the free national economy that states adopted as their goal in uniting under the Constitution.[60]

The Supreme Court revisited the market participant doctrine again in *White v. Massachusetts Council of Construction Employers, Inc.*[61] The issue in *White* concerned the constitutionality of an executive order by the mayor of Boston requiring all construction projects funded by the city to use local residents for at least half of its worker hours. The Court held that the order did not violate the Commerce Clause, insofar as the city expended its own funds in entering construction contracts for public

54. *Id.* at 810.
55. 447 U.S. 429 (1980).
56. *Id.* at 430.
57. *Id.* at 429.
58. *Id.* at 437.
59. *Id.* at 450.
60. *Id.* at 453–54.
61. 460 U.S. 204 (1983).

projects. Therefore, the city was participating in the market rather than seeking to regulate it.[62]

Later, in *Trojan Technologies v. Pennsylvania*, the Court of Appeals for the Third Circuit considered whether the Commerce Clause preempted the Pennsylvania Steel Products Procurement Act.[63] The Act required suppliers contracting with a public agency in connection with a public works project to provide products with American-made steel.[64] The court noted that Pennsylvania was one of at least eleven states to enact some form of "Buy American" legislation.[65] Furthermore, the lack of a congressional plan limiting states to operate freely in the market aided in the court's determination that the State was acting as a participant rather than a regulator.[66]

Although it is unclear whether the market participant doctrine enjoys continued validity in a post-WTO context, it appears from the history of jurisprudence that the nature of the activity that the state engages in affects whether the Commerce Clause bars the action. Thus, if the State acts as a market participant rather than a market regulator, it may enact discriminatory laws that favor local production or sourcing and evade preemption under the Commerce Clause in the absence of contrary congressional action. In determining whether the state is acting as a market participant, judicial precedent indicates that courts will consider whether the State's actions interfere with the flow of commerce and whether they are regulatory in nature.[67]

B. State Legislation and the Foreign Affairs Power

"The President shall be Commander in Chief of the Army and Navy of the United States . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."[68]

62. *Id.* at 215.
63. 916 F.2d 903, 904 (3d Cir. 1990).
64. *Id.*
65. *Id.* at 913.
66. *Id.* at 912.
67. *Hughes*, 426 U.S. at 808.
68. U.S. CONST. art. II, § 2.

Although the foreign affairs power of the President is not clearly embodied in Constitutional provisions, courts have concluded that Article II of the Constitution recognizes the President's responsibility for the conduct of U.S. foreign relations.[69] Consequently, the Court has struck down laws that violate the President's authority. For example, in *Zschernig v. Miller*, the Supreme Court considered the validity of an Oregon statute that escheated to the State any real or personal property that was inherited by nonresident aliens of Oregon.[70] The Court concluded that "foreign policy attitudes, the freezing or thawing of the cold war, and the like are the real desiderata" in judicial determination of the validity of the statute.[71] Thus, the Court held that the Oregon statute enabled judges to interfere with matters exclusively reserved to the President and Congress and therefore exceeded the state's power.[72] Subsequently, in *Bethlehem Steel Corp. v. Board of Commissioners*, the Court of Appeals for the Second District considered the validity of the California Buy American Act, which required contracts for public works to be awarded only to those who used or supplied materials manufactured in the United States.[73] The Court held that the Act was effectively an embargo on foreign products, amounting to a usurpation by the State of the federal government's power to conduct foreign trade policy.[74] In so holding, the Court cited *Zschernig*, finding that the Act had more than an incidental or indirect effect on foreign countries and

69. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (stating that "[t]he President . . . possesses in his own right certain powers, conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ for foreign affairs.").

70. 389 U.S. 429, 429 (1968).

71. *Id.* at 437.

72. *Id.* at 441.

73. 276 Cal. App. 2d 221, 224 (Cal. Ct. App. 1969); CAL. GOV'T CODE § 4303 (2007) (stating "[t]he governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contract for (1) the construction, alteration, or repair of public works or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States.").

74. *Bethlehem*, 276 Cal. App. 2d at 224.

constituted a type of protectionism that invited retaliatory restrictions on U.S. trade.[75]

The Supreme Court revisited the issue of state laws interfering with foreign affairs in the case of *American Insurance Ass'n v. Garamendi.*[76] This case questioned the validity of California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which required any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945 or forfeit his or her state business license.[77] The goal of the legislation was to force payment from defaulting insurers.[78] Holding that the HVIRA interfered with federal foreign affairs power, the Court preempted the Act and upheld an existing Presidential agreement that created an exclusive mechanism for dealing with insurance compensation for victims of the Holocaust. [79] However, in *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission,*[80] the New Jersey Supreme Court held that the New Jersey Buy American statutes, which required the use of domestic materials in the State's procurement activities,[81] did not directly affect foreign affairs and therefore did not violate the Commerce Clause, GATT, or federal foreign affairs power.[82] The court also sought to distinguish *Bethlehem*, holding on its facts that the New Jersey statute was more restricted in sphere and impact than the California Buy American Act[83] because it indicated that domestic materials need not be used if the cost is "unreasonable," "inconsistent with the public interest," or "impracticable."[84]

75. *Id.* at 228.

76. 539 U.S. 396 (2003).

77. *Id.* at 409.

78. *Id.*

79. *Id.* at 413.

80. 75 N.J. 272 (N.J. 1977).

81. *Id.* at 276; N.J. Stat. Ann. § 52:32-1 (2008) (stating "[t]he state shall make provisions in the specifications for all contracts for state work and for work for which the state pays and part of the cost, that only such manufactured and farm products of the United States, whenever available, be used in such work.").

82. *K.S.B.*, 75 N.J. at 279.

83. *Id.* at 292.

84. *Id.* at 293.

The jurisprudence indicates that when the state or local government acts as a market participant, the court will consider whether the state's actions interfere with the flow of commerce to determine whether the law violates the Commerce Clause.[85] Additionally, when the law infringes on the ability of the federal government to "speak with one voice" in foreign relations and has more than an incidental or indirect effect on foreign nations, it may be struck down under the Foreign Affairs Power.[86] Although there seems to be no consistent pattern of application of one doctrine or the other, it is clear that the court could use either doctrine to strike down state laws that interfere with foreign trade.

C. State Law Challenges Brought Under both Domestic and WTO Proceedings

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."[87]

The Supreme Court has ruled that certain state legislation prohibiting state entities from doing business with another country is unconstitutional and preempted by the Supremacy Clause. In Massachusetts, state legislation prohibited state entities from purchasing goods and services from any persons doing business in or with Burma.[88] The purpose of the law was to impose economic sanctions on Burma for human rights infringements and for political oppressions by the junta government.[89] However, shortly after the law was enacted, the European Community (EC) and Japan brought a petition to the WTO Dispute Settlement Body against the United States, alleging that the law infringed

85. *Hughes*, 426 U.S. at 808.
86. *Zschernig*, 389 U.S. at 432.
87. U.S. CONST. art. VI, § 2.
88. *See* Matsushita, *supra* note 3, at 306.
89. *Id.* at 306–07.

on GPA provisions.[90] The EC contended that the Massachusetts law attached conditions for the participation of suppliers in tendering procedures that violated GPA requirements. Furthermore, the EC alleged that the Massachusetts law violated the principles of national treatment and impaired EC benefits by limiting access of sub-federal government procurement to EC suppliers.[91]

Simultaneously, the National Foreign Trade Council litigated against the State of Massachusetts in *Crosby v. National Foreign Trade Council*.[92] The U.S. Supreme Court held that the Supremacy Clause preempted the Massachusetts legislation[93] and that the Act undermined the intended purpose and natural effect of a federal statute imposing a set of sanctions on Burma.[94] During litigation of the case in U.S. courts, the EC and Japan suspended the panel proceedings at the WTO and exerted pressure through official protests to the Department of State, warning that the Massachusetts Act could have damaging effects on bilateral relations.[95] The EC also submitted amicus briefs to the district court, arguing that the Massachusetts Act created an issue of serious concern and the WTO dispute would threaten relations with the United States.[96] Furthermore, the EC submitted that they would reinstate their WTO proceedings should the Court rule in favor of the state law.[97] These considerations were prominent in the Court's analysis, reasoning, "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics."[98] Specifically, the Court found that the Massachusetts Act stood

90. Communication from the DSB Chairman, *United State—Measure Affecting Government Procurement*, WT/DS88/4, WT/DS95/4 (Jan. 11, 1999).

91. Request for the Establishment of a Panel by the European Communities, *United States—Measures Affecting Government Procurement*, WT/DS88/3 (Sept. 9, 1998).

92. 530 U.S. 363 (2000).

93. *Id.*

94. *Id.* at 368.

95. *Id.* at 382.

96. *Id.* at 383.

97. *Id.*

98. *Id.* at 381.

as an obstacle to the Federal Act's delegation of discretion to the President to control economic sanctions against Burma.[99] The Federal Act placed the President in a position to exercise economic leverage against Burma while accommodating the needs of national security.[100] In addition, the Massachusetts Act interfered with Congress's intention to limit economic pressure against the Burmese government to a specific range.[101] Congress specifically calibrated their policy to "steer a middle path" which balanced the sanctions against Burma with U.S. investment in Burma.[102] The Court further found that the Massachusetts Act conflicted with the President's authority to speak for the United States in negotiations with other nations to develop a comprehensive, multilateral Burma strategy.[103]

Crosby has several important implications. The Court considered the international effects of the state action important factors in assessing the validity of the state legislation at issue.[104] Furthermore, the case indicates another justification for prohibiting state legislation that interferes with foreign commerce. Although the Supremacy Clause invalidated the Massachusetts law, the Court cited to the other challenges brought against the law, including those stemming from the Commerce Clause and the foreign affairs power of the President.[105] The Court's recognition of these factors reaffirms that state laws interfering with foreign commerce may be evaluated under numerous lenses in future cases.

IV. THE DEBATE: FEDERALISM VS. IMPORTANCE OF NATIONAL CONSENSUS

Aside from the constitutional validity of state "buy local" legislation, there is a debate concerning the value of such legislation in today's

99. *Id.*
100. *Id.* at 375.
101. *Id.* at 369.
102. *Id.* at 378.
103. *Id.* at 364.
104. *Id.* at 383.
105. *Id.* at 374.

increasingly globalized world. In *Bethlehem,* the court cited an editorial in the New York Journal of Commerce, stating:

> Washington's opportunity to win meaningful tariff concessions from foreign countries in the current Kennedy Round may be much curtailed by 'Buy American' or by simply 'buy local' laws adopted in many states . . . the cumulative effect of procurement restrictions among many states can produce impossible rigidities in national policy. Even those who do not approve of the national foreign trade policy should realize that if it is to be determined by the future policies of 50 different entities, there won't be any policy at all.[106]

A letter directed to the United States Trade Representative from a public interest group known as "Public Citizen" offers an alternate perspective:

> Controlling the level of expenditure, and directing the expenditure to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods to cover economic downturn. National policies that give preference to local firms, suppliers and contractors boost domestic economy . . . For procurement or concessions where foreign firms are invited to bid, being able to give preference to firms from particular countries is—for better or for worse—a commercially powerful international-relations policy tool.[107]

The contrasting statements above present the tension between states and the federal government vis-à-vis international trade agreements, including the GPA. Concerns over the environment, health of local populations, and off-shoring jobs, have mushroomed in recent years,

106. *Bethlehem*, 276 Cal. App. 2d at 228.

107. Letter from Lori Wallach, Dir., Pub. Citizen's Global Trade Watch, to Jean Heilman Grier, Senior Procurement Negotiator, Office of the U.S. Trade Representative 3 (Nov. 1, 2004) (on file with author), *available at* http://www.citizen.org/documents/GTW_WTOGPAComments toUSTR.pdf.

with states asserting their sovereign rights over these matters.[108] The increasingly localized nature of the debate has strong support from public interest groups arguing that subjecting government procurement at the national or sub-central level to global rules on how taxpayers' funds may be spent, chokes the taxpayers' reasonable expectation of democratic accountability over how their money is spent.[109] Nevertheless, the Bush administration has adopted a free trade agenda, rolling out numerous trade agreements believed to benefit the nation as a whole.[110]

The federal government has bound all federal entities to its agreements; however, the GPA only applies to state entities when the governor of the respective state signs a letter indicating his compliance with the agreement.[111] State legislators have raised concerns over the GPA commitments made by their past governors as well as the process used to determine whether a State offers market access in procurement agreements.[112] Many view the issue as one of separation of powers, whereby state procurement policy is in the constitutional realm of the legislative branch and not the executive.[113] In fact, the National Conference of State Legislatures addressed this concern in comments to the USTR by stating:

> In light of recent experience with the World Trade Organization's Government Procurement Agreement, it is critical to stress that decisions affecting State procurement practices must be made in consultation with State legislators. While the executive branch is an important partner in State procurement decisions, State legislators are equally vital. It is clear that

108. John Nichols, *Global Fights Go Local*, NATION, Aug. 12, 2004, http://www.thenation.com/doc/20040830/nichols.

109. Wallach, *supra* note 107 (arguing that "when the United States subjects its procurement activities to the constraints of a global pact such as the AGP, the Executive Branch of government is substituting its judgment about how best our tax dollars should be used.").

110. Associated Press, *House Approves Peru Trade Agreement*, WALL ST. J., Nov. 8, 2007, at A2. *See also* Matsushita, *supra* note 3.

111. Taylor, *supra* note 27, at 6.

112. Wallach, *supra* note 107, at 6 (stating, "setting state procurement policy is the constitutional realm of the Legislative, not the Executive Branches.").

113. *Id.*

> Governors' commitments alone cannot legally bind a State. Indeed, State laws and constitutions require action by the legislature for a State to bind itself voluntarily to any new procurement regime.[114]

Supporters of the free trade agenda, however, argue that there is a tremendous amount to gain from state participation in the GPA. First, companies in GPA member states receive greater opportunity to sell their products and services in the foreign members' government procurement market.[115] A study commissioned by the National Association of Manufacturers suggests that countries sanctioned by federal, state, and local governments of the United States represent 2.3 billion potential consumers of U.S. goods and services, and about $790 billion worth of export markets.[116] Furthermore, by guaranteeing open competition, states can utilize tax dollars most effectively and avoid purchasing more expensive goods and services from less efficient domestic firms.[117] In addition, open procurement policies empower states to deal with the realities of the global marketplace, where dependency on global supply chains is increasingly unavoidable.[118] Moreover, states can choose to maintain preference programs targeted at small businesses, distressed areas, minorities or women, as well as making purchases in accordance with their own environmental policies.[119] Thus, states have greater autonomy by choosing which agencies the GPA will govern and which goods and services to include.[120] Further, state support for international

114. Letter from Philip Prelli, Vice Chair, Nat'l Conference of State Legislatures (NCSL) Agric. and Int'l Trade Comm., to Gloria Blue, Executive Sec'y, Trade Policy Staff Comm. (Aug. 22, 2001), *available at* http://www.ncsl.org/ statefed/ftaa082201.htm.

115. OFFICE OF THE U.S. TRADE REPRESENTATIVE, STATE GOVERNMENT PROCUREMENT AND TRADE AGREEMENTS: SENDING A POSITIVE SIGNAL ABOUT WELCOMING INTERNATIONAL BUSINESS AND INVESTMENT: TRADE FACTS 1 (2006), http://www.ustr.gov/assets/Document_Library/Fact_ Sheets/2006/asset_ upload_file344_9260.pdf.

116. *See* James J. Pascoe, Note, *Time For A New Approach? Federalism and Foreign Affairs After Crosby v. National Foreign Council*, 35 VAND. J. TRANSNAT'L L. 291 (2002).

117. Christopher Yukins & Steven Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT'L L. 529, 535 (2007).

118. *Id.*

119. *Id.*

120. *Id.*

agreements such as the GPA provides the federal government with much power in negotiations with other countries. The USTR noted that in free trade agreement negotiations with Australia, "Australia had been unwilling to cover its states and territories unless the United States cover[ed] a significant number of states."[121]

V. CONCLUSION

In our increasingly globalized world, the debate between state rights vis-à-vis international agreements presents challenging questions. Although some argue that Congress and the Executive should commit states to mandatory coverage under international procurement agreements, the importance of respecting the state's right to allocate taxpayer dollars as they wish, impels a different approach.[122] Currently, neither side acknowledges the power of the federal government to require states to join the GPA; however, the USTR does exert a tremendous amount of power on states to comply. Furthermore, the cases discussed above indicate that courts give deference to federal power to engage in trade relations by consistently ruling against state laws that interfere with this authority. The recourse available to states is to opt out of such agreements. However, this insular approach results in a loss of access to the global procurement market and the opportunities it provides.

The GPA benefits its member states in several ways. It creates more competitive procurement markets, freeing up taxpayer dollars to address public programs through enhancing the quality of resource allocation. It secures export opportunities to the markets of other member states. Lastly, it introduces checks and balances on the activities of the government, forcing transparency in their procurement decisions. The vast procurement market and the benefits derived from states signing on to the GPA are too large to ignore. Exceptions within the agreement that provide for protection of the environment and susceptible populations

121. Office of the U.S. Trade Representative, *supra* note 17.

122. Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 167 (1993).

empower the state with the degree of autonomy that properly acknowledges their sovereign concerns. Despite the numerous advantages that states may gain by committing to the GPA, the USTR should make a greater effort to include states in their discourse prior to signing on to such agreements. Currently, the USTR relies solely on the executive branch of the state to commit its agencies to the agreement. Encouragement and education could reduce the estrangement that many states and local entities feel from the trade process.[123] Such mechanisms could include providing increased input by the states in negotiations of agreements, increased involvement in implementing legislation, and a larger role in the administration of the trade disciplines affecting state matters.[124] The resulting involvement would enable the stakeholders to understand the importance of such agreements and the myriad benefits that they provide. Only then can the proper balance be achieved, respecting state rights and recognizing the value derived from international trade agreements, such as the GPA.

123. Edward T. Hayes, *A Comparative Analysis of the Regulation of State and Provincial Governments in NAFTA and GATT/WTO*, 5 CHI. J. INT'L L. 605, 621 (2005).

124. *Id.*

Informational Advantages in an International World—Kurtzman & Yago's *Global Edge: Using the Opacity Index to Manage the Risks of Cross-Border Business*

ILMR Editors[*]

I. INTRODUCTION

Are you or someone you know interested in international transactions or overseas business? If so, this book could become a useful part of your professional library. In *Global Edge: Using the Opacity Index to Manage the Risks of Cross-Border Business*,[1] Joel Kurtzman and Glenn Yago provide helpful economic analysis of international business conditions, which promises to facilitate the decision-making aspect of international business. The authors call this economic analysis the "Opacity Index"—a scale of relative and differentiated risks of global business dealings. The book's purpose is not to provide specific answers to definite problems (the authors do not pretend to have written a comprehensive instruction manual on international business). Instead, the authors highlight and alert the reader to globalization's potential problems and ramifications on the success—or failure—of a business venture. For instance, the book does not explain how to overcome problems related to corruption, but rather quantifies the economic effect of corruption in a particular country, allowing a decision-maker to factor the effect into the cost- benefit analysis of a transaction.

Although this book is based on extensive and complex economic data, the book's format includes only the results of the authors' research, not the underlying research or raw data. The condensed format makes this book more accessible to the general reader. However, because the

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[*] The BYU ILMR editors responsible for writing and editing this book review include Michael Cummings, Dorothy Hatch, Tyler Lake, Natalia Martins, and Kyle Woods. All five are Juris Doctor candidates at Brigham Young University's J. Reuben Clark Law School.

1. JOEL KURTZMAN & GLENN YAGO, GLOBAL EDGE: USING THE OPACITY INDEX TO MANAGE THE RISKS OF CROSS-BORDER BUSINESS (Harvard Business School Press 2007). The book contains 220 pages (plus an introduction) and the ISBN is 1-4221-0346-3.

authors keep their raw data somewhat private, the reader also needs to trust the authors' methodology in order to trust their conclusions. Despite this difficulty, the book's authors are largely successful at presenting their message in a coherent, usable fashion—a plus for those busy people who will most benefit from reading and applying the book's principles. The authors' wish is that after reading *Global Edge*, "people in business, government, and NGOs will begin to see the world differently, enabling them to craft better strategies, develop better tactics, and make better decisions about what really matters."[2]

While the book may not completely alter the reader's worldview, it is helpful enough to warrant the time and effort necessary to examine and implement its principles.

II. AN OUTLINE OF THE BOOK

Kurtzman and Yago begin their book with an introduction defining and describing the Opacity Index and its potential usefulness for business, civic, and humanitarian leaders. This introduction sets the tone for chapters 1 and 2, which discuss the risks of globalization and costs of opacity. Following this discussion of the generalized risks of international business dealings, the authors discuss each of the CLEAR factors (Corruption, Legal, Enforcement, Accounting, and Regulations) in chapters 3 through 6. Chapter 7 discusses the particularized applications of the CLEAR factors for business success. Chapter 8 contains a sampling of the opacity profiles of a handful of countries. Finally, chapter 9 addresses broader issues regarding opacity's importance.

III. THE OPACITY INDEX

What is opacity? It is the "lack of clear, accurate, formal, clear-cut, and widely accepted practices in the broad arena where business, finance, and government meet."[3] According to Kurtzman and Yago, those involved in business, finance, and government must study these

2. *Id.* at xx.
3. *Id.* at xiii.

problems because opacity can "retard the progress of globalization, slow down growth, and add a great many unanticipated costs to doing business."[4] This is true (according to basic economic theory) because efficient decision-making occurs only when an individual possesses all relevant information. Inefficient decisions, on the other hand, can occur in the face of uncertainty about potential risks, a complete lack of information regarding a potential risk, or worse, erroneous information regarding the risk (nature, frequency, magnitude, etc.). An understanding of the Opacity Index, which "offers a new concept of what matters in the global economy and a new system for rating and thinking about risk," can help businesses, governments, and individuals overcome the informational deficit and make better, more efficient, and more profitable business and policy decisions.[5] But the authors make clear that "Opacity risk alone is not the enemy of business; the true enemy is the ignorance or inability to measure and assess it."[6]

Assuming the authors are correct, the Opacity Index's most useful purpose is that an individual considering a business transaction or venture in an opaque country can calculate the cost of opacity—how profitable his or her business needs to be in order to outweigh the risks of opacity.[7] Unfortunately, exact figures are difficult to determine, due to dynamic economic change. Even many of the authors' case studies demonstrate that a country with a bleak economic future may, with time, catch up with the most economically advanced countries.[8] The converse is true with a country with a bright economic future. Therefore, some of the book's information is already inaccurate. For example, the authors wrote that Hugo Chavez (the left-wing president of Venezuela) is "all bark and no bite" when it comes to expropriation of U.S. business interests;[9] however, in early 2008, Chavez expropriated, among others,

4. *Id.* at xiii.

5. *Id.* at xiii. Although *Global Edge* does not contain detailed economic analyses for every nation on earth, the Authors have attempted a comprehensive analysis, and the book purports to address 90.3% of the global GDP.

6. *Id.* at 187.

7. *Id.* at 32.

8. *Id.* at 57–58.

9. *Id.* at 12.

Exxon-Mobil's assets in Venezuela.[10] Despite the problems of economic fluctuations and subsequent changes in the indices, the general principles in the book will be valid unless every country becomes perfectly transparent, an event unlikely to ever occur.

IV. THE RISKS OF GOING GLOBAL/COSTS OF OPACITY

Kurtzman and Yago identify the need for the Opacity Index by introducing the risks associated with involvement in international business opportunities. To illustrate these risks, the authors share the experience of an acquaintance from the United States who tried to introduce a U.S. computer program to China. The American acquaintance was not surprised by any part of the investment process until the software code was stolen by a Chinese company with which the Americans were working. When the Americans pursued legal remedies against the Chinese company, the presiding judge (prior to the litigation) told them that if they pursued the litigation in Chinese courts, witnesses and other individuals would begin to disappear and the U.S. company would eventually be asked to leave China. As an alternative, the judge suggested that the American company settle the dispute outside of court, because this was in keeping with the Chinese way of doing business.[11] Traditional risk assessment is normally inadequate, especially in high-risk countries like China. Instead, "corruption, impaired legal systems, poor economic and enforcement policies, and flawed accounting standards" are essential factors to consider, but are often overlooked by firms that help companies go global.[12] Kurtzman and Yago further argue that unenforced regulations pose a higher risk to international business opportunities than revolutions, coups, or terrorism,[13] meaning that the accumulated costs of doing business in a highly opaque country have a

10. Caroline Binham and Joe Carroll, *Exxon's $12 Billion Venezuela Asset Freeze Overturned*, BLOOMBERG, http://www.bloomberg.com/apps/news?pid=20601086&sid=ahEO3V_IPHKQ&refer=news (discussing the ongoing legal battles between Venezuela and Exxon).

11. *Id.* at 1–2.

12. *Id.* at 2.

13. *Id.*

more severe effect on international business than do the more discrete but highly reported political events of a country.[14] Events such as war and terror do not typically injure business in the long run, even though these events may immediately stop business activities and cause a drop in the financial markets.[15]

In anticipation of skepticism, the authors identify the biggest challenge they faced in expressing the point of the book: the "data point of one" problem.[16] The problem occurs when people tend to make decisions based on personal success stories rather than on rational examination of the risk of doing business in a country. This problem is most evident when an individual has done business and had no problems with a particular country that rates poorly on the Opacity Index. The person may then argue that the Opacity Index itself is inaccurate because he has not personally experienced any of the problems that the Index identifies. However, the authors suggest that, despite this single bit of disconfirming data, when all of the CLEAR elements are accounted for a more rational analysis would indicate that some countries pose a substantially higher level of risk than others. The authors wrote this book to help make people aware of and consider the risks of doing business internationally.[17]

Chapter 1 contains a table that succinctly represents the authors' Opacity Index findings. According to the Opacity Index, the United Kingdom, Finland, Hong Kong, the United States, and Denmark are the five most transparent countries. Towards the bottom of the list are countries such as Saudi Arabia, Indonesia, Lebanon and Nigeria.[18] The table is helpful because it evaluates each country's five CLEAR factors

14. *Id.* at 17–18.

15. *Id.* at 18.

16. *Id.* at 3. The authors tell the story of Sir Brian Urquhart, a World War II soldier who jumped out of an airplane only to discover that his parachute had malfunctioned. He lived to tell his story, but never once recommended jumping out of an airplane without a parachute. The authors worry about, and the book was written for, those considering "falling through the air with a chute that won't open."

17. *Id.* at 3.

18. *Id.* at 6–7, tbl.1-1. The Opacity Index (and related discussion) is also available at the Kurtzman Group website at www.kurtzmangroup.com.

and assigns each factor a rating. The table then gives the opacity score for the country and ranks it in comparison to the other countries considered in the study. The table is believable, but a comparison of the scores (i.e., the exact way that one country receives a corruption score of sixteen and another country a three) is not intuitive, and a certain level of trust is needed to accept that the research the authors completed and the conclusions they reached are accurate. The authors' failure to lay out a specific methodology for calculating the scores heightens this problem. However, the table provides a good picture of which countries are opaque and which are transparent; the details of the methodology will most likely be unimportant unless a company is choosing between countries with nearly identical scores.

The authors clarify risks associated with international business by distinguishing between large-scale, low-frequency risks and small-scale, high-frequency risks. Large-scale, low-frequency risks are those typically seen in newspaper headlines—earthquakes, political coups, terrorism, and war. Although these events may appear significant (and often are), the actual cost to business is small compared with small-scale, high-frequency risks. For example, terrorism, a large-scale, low-frequency risk, has a short-term cooling effect as opposed to imposing large and substantial long-term costs.[19] Following the terrorist events in New York, Madrid, Bali, and London, market activity experienced an immediate negative effect, but the markets revived again as soon as the immediate threat of terrorism passed.[20] Small-scale, high-frequency risks such as "corruption, fraudulent transactions, bribery, legal and regulatory laxities, unenforceable contracts, [and] breaches of codes of conduct" are factors that more substantially affect the cost of doing business in a foreign country.[21]

The Opacity Index offers more analysis than that provided by political analysts.[22] The Index does not just indicate that there are risks

19. *Id.* at 17.
20. *Id.* at 18.
21. *Id.* at 11.
22. *Id.* at 15–16.

associated with doing business in a foreign country, it also estimates or predicts the cost of that risk.[23]

In chapter 2, Kurtzman and Yago give a general warning and specific details as to the increased costs associated with the increase in a country's opacity. Speaking generally, the authors state that those in business often do not take into account the costs associated with small-scale, high-frequency risks in high-opacity countries.[24] Business leaders often do not understand the detailed foreign operations of the companies for which they work; this lack of knowledge causes an increased cost build-up associated with doing business in these countries. The authors state that most companies need help identifying and defining the risks they assume when doing business in foreign countries. The common practice of decentralizing a company's management often results in increased efficiency and a faster decision-making process; but, decentralization and its accompanying lower level of opacity discovery has the side effect of greater risks and higher costs.[25]

Higher opacity scores correlate directly to a number of negative consequences for growth. The authors found that with each increase of one point on the Opacity Index, the following occurs on average:

[1] A decrease in average per capita income of $986 a year
[2] Lower net foreign investment as a percent of GDP by 1 percent
[3] Lower Capital Access Index scores by 0.06 points
[4] Lower bank assets as a percent of GDP by 4 percent
[5] Lower stock market capitalization as a percent of GDP by 0.9 percent
[6] Lower stock market trades value as a percent of GDP by 0.9 percent
[7] Increased average borrowing interest rate by 57 basis points
[8] Increased inflation rate by 0.46 percent[26]

23. *Id.* at 32. In an earlier rendition of the Index, an "Opacity Premium" was provided to put the cost of doing business in foreign countries into specific, economic terms. *See* Kurtzman, Global Costs of Opacity, 46 MIT SLOAN MGM'T REV. 41 (2004).

24. *Id.* at 39.

25. *Id.* at 41.

26. *Id.* at 41–42.

The authors present evidence from studies in which high opacity directly correlates to negative business consequences. For example, one study found that "the countries with low per capita GDP's tend to have higher levels of opacity on average, whereas richer countries have lower levels."[27] Another study found that Foreign Direct Investment, which improves economic growth, is affected negatively by opacity. Opacity also increases capital costs and slows financial system development. Finally, opacity can lead to a "hidden tax," which is caused by the increased cost of doing business in an opaque country.[28]

To demonstrate the costs of opacity, the authors compare and contrast two countries—Finland and Russia—to show the distinction between countries on different ends of the opacity spectrum. Finland's score is seventeen, while Russia's score is forty-five. The countries were in similar situations at the time of the Cold War; both countries had invested heavily in education and were poor despite significant natural resources.[29] At the end of the Cold War, however, the two countries followed different developmental paths. Russia declined economically after the Cold War because of corruption, insufficient legal protections, and poor regulation. Russia suffered economically despite its rich oil resources. In contrast, Finland has developed a vibrant economy due to institutional strength, effective regulation, and a lack of corruption. Although Finland was not involved in the telecommunications industry during the period of the Cold War, it has become a leader in the industry. This is due, at least in part, to Finland's transparency.[30]

V. THE CLEAR FACTORS

A. Discussion of the Factors

To present their Opacity Index, the authors chose the clever acronym CLEAR, which stands for the five factors the authors believe govern

27. *Id.* at 45.

28. *Id.* at 55. A hidden tax is a non-governmental increase in the cost of doing business. *Id.*

29. *Id.* at 57.

30. *Id.* at 57–58.